IN THE HIGH COUR TOF BOMBAY AT GOA

WRIT PETITION NO. 402 OF 2004

M/s. Kadamba Transport
Corporation Ltd.,
a Company registered under the
Companies Act, 1956, having its
Head Office at Parasio de Goa,
Porvorim, Bardez, Goa. ..... Petitioner.

V/s.

1. State of Goa,
   through the Chief Secretary,
   Secretariat, Panaji, Goa.

2. The Industrial Tribunal,
   Government of Goa,
   Shram Shakti Bhavan,
   EDC Complex, Patto Plaza,
   Panaji, Goa.

3. The Mamlatdar of Tiswadi Taluka,
   having his Office at Collectorate,
   Panaji, Goa.

4. The Collector of North Goa District,
   having his office at Collectorate,
   Panaji, Goa.

5. The Commissioiner of Labour,
   Government of Goa,
   having his Office at
   Shram Shakti Bhavan, EDC Complex,
   Patto Plaza, Panaji, Goa.

6. Shri Naguesh Gawas,
   major of age, resident of House No.52,
   behind the Church,
   Bambolim, Tiswadi, Goa. ..... Respondent.

Shri D.B. Ambekar, Advocate for the petitioner.

Shri S. Malyekar, Addl. Government Advocate for respondents No.1, 3 and 4.

Shri A.V. Nigalye and Shri Vivek L. Desai, Advocates for respondents No. 6.

CORAM : B.H. MARLAPALLE, J.

DATE : NOVEMBER 04, 2004.

ORAL ORDER :

In this petition, filed under Articles 226 and 227 of the Constitution, the petitioner has challenged the Award passed by the Industrial Tribunal on 15.11.2002 in Reference No.IT/40/95. By the said Award, the order of dismissal passed against respondent No.6 employee came to be set aside and he has been ordered to be reinstated, in service, with full back ages and all other consequential benefits, including continuity in service. The petitioner has also prayed for directions against respondents No.1 to 5 commanding them not to proceed with any recovery against it.

2. The respondent employee was appointed as a Helper-Mechanic with effect from 12.4.1988 on completion of his apprenticeship. On 14.5.1991, he was on duty in the second shift, i.e. from 5.30 p.m. to 2.00 a.m. It was alleged that at about 1 a.m. (mid night) he came out of the main gate and he was caught with an electric starter in his hands, which he had picked up from the outer

fence near the main security gate, where the buses were parked. It is contended by the petitioner that the said starter was thrown out of the compound/fence and was noticed by the security staff at about 9 p.m. To nab the culprit, a security watch was being kept and at about 1.00 a.m., the Security Assistant by name Nanda Naik who was keeping watch, caught the respondent employee red handed. Report was prepared by PW.3 Babaji Swant and on the next day he was issued charge-sheet and was also placed under suspension. The workman denied the charges and, therefore, a domestic inquiry was conducted. The Inquiry Officer, vide his report dated nil, held that the charge-sheeted workman had committed theft of the company's property i.e. self starter. Consequently, by order dated 31.5.1994 he was dismissed from service, after 3 years from the date of the incident. He challenged the said dismissal order in conciliation, and, therefore, the legality and justifiability of the said order was referred for adjudication to the Industrial Tribunal under Section 10(1) of the Industrial Disputes Act, 1947 (for short "the I.D. Act").

3. Preliminary issues regarding the inquiry being fair and proper and whether the charges of misconduct levelled against the workman were proved to the satisfaction of the Tribunal by acceptable evidence, were answered by Award Part-I passed on 20.3.1998. The Tribunal held that the misconduct was not proved against the workman, though issue No.1 regarding fairness of the domestic inquiry was deleted on an application made by the workman employee,

as he did not press for the same. The employer was called upon to lead evidence to prove the charge levelled against the workman and it examined three witnesses, namely PW.1 Shri Anil Bhalchandra Prabhu, Depot Manager, PW.2 Nanda S. Naik, Security Assistant, and PW.3 Shri Babaji Sawant, Security Officer. Whereas, the workman examined himself as DW.1. On the assessment of the evidence, the Tribunal by the impugned Award, held that the charge of theft levelled against the workman was not proved and, therefore, the action of the petitioner in terminating the services of the workman by Order dated 31.5.1994, was illegal and unjustifiable.

4. Mr. Ambekar, the learned Counsel for the petitioner urged before this Court that the impugned Award was manifestly erroneous. The finding that the charge of theft against the workman was not proved, is contrary to the evidence adduced before the Tribunal. It was contended that the workman was caught red handed by the security staff who were examined before the Tribunal. They had no animus with the workman and, therefore, their testimony was fully reliable. On the face of the evidence adduced by the petitioner, the workman ought to have been held guilty of committing theft of the employers' property namely the self starter. It was also submitted that when the workman had given up the issue regarding fairness of the inquiry, there was no scope for the Tribunal to re-appreciate the evidence recorded before the domestic Tribunal.

5. In the Part-I Award, the Tribunal has given justifiable reasons in support of its finding that the charge of theft was not proved against the workman in the impugned final Award. The Tribunal has analysed the evidence in great details. It noted that the self starter which was received in the depot on 14.5.1991, as per the evidence of PW.1, was allegedly thrown out of the fence and it was noticed by the Security Staff at about 9 p.m. It was not the case of the petitioner that the charge-sheeted workman had thrown the self starter across the fence and near the main gate and, in any case, the petitioner company did not make any efforts to nab the culprit, who had purportedly thrown the self starter outside the compound/fence. As per the petitioner, the workman went out of the main gate at about 1.00 a.m. and picked up the self starter and while he was proceeding towards the scooter park lot, he was chased by PW.2 and caught him red handed. He was brought to the main gate where PW.3 was also present.

Much reliance has been placed on the sketch drawn and submitted at Exhibit W-2. The learned Counsel for the petitioner, in his exhaustive arguments, by referring to this sketch submitted that the Tribunal was in gross error in acquitting the workman from the charge of theft. Even if this sketch proved to be right, it was appropriate for the Tribunal to analyse the evidence in its totality on the issue of charge of theft having been proved. The charge of theft presupposes that the employer's property was being taken away from the premises clandestinely or in connivance with an intention to

defraud the employer. It is nobody's case that the workman was caught in the security search. Admittedly, the self starter weighed about 17 kgs. and it was lying outside the compound/fence of the depot, but very much inside the premises of the petitioner. The evidence on record clearly shows that the workman admitted to have picked up the self starter, after he went out of the main gate and as per the workman, while he was bringing the same to the main gate, PW.2 saw him and questioned him. The workman informed him that he was taking the self starter inside the depot as he had noticed it lying outside the fence, while he went for urination. It is also admitted that the workman had come out of the gate with the permission of the security staff and to attend to his scooter. From the statement recorded of the workman at the spot and placed on record at Exhibit W-5, the workman stated that he noticed the self starter when he went out of the main gate to attend to his scooter, and he lifted the same and deposited at the security gate. The security report submitted by PW.3 at Exhibit W-3 also stated specifically that when the workman was taking the self starter, the workman had replied that he was taking the same to the depot. The workman had picked up the self starter in the premises of the petitioner and it was not during security search, when the workman was taking the self starter outside the premises.

6. The versions of the three witnesses examined by the petitioner who attributed the misconduct against the workman, are also different. PW.1 who was not an eye witness stated in his

deposition before the Industrial Tribunal that the starter was kept in a tempo bearing registration No.GDX 505, inside the depot premises an it was thrown out of the depot premises and near the fence along side the main gate. At about 1.10 hours, the security on duty, found the workman walking towards the starter which was lying outside the depot and, thereafter, he lifted it. His intention was to commit theft of the said starter. Whereas, PW.2 stated that he was keeping a watch, so as to find out who would come to pick up the self starter. Initially he stated that he was hiding himself in a bus, but subsequently, he stated that he was standing behind the bus. PW.3 is not an eye witness and he stated that he came to the spot only after he was called by PW.2. But, both these witnesses were consistent in their statement that at the threshold when the workman was asked as to where he was carrying the self starter he had informed that he was taking the same to the depot. The Tribunal has accepted this to be a genuine statement, after examining the evidence adduced before it. The finding recorded by the Tribunal cannot be termed as perverse. The charge of theft is serious and in addition to inviting capital punishment of loss of employment, it entails criminal prosecution. In the instant case, there were no ingredients of “theft” if regards be had to the totality of the circumstances. Both, PW.2 and PW.3 admitted in their evidence that the out gate was further away from the alleged spot where the workman was holding the self starter. This also indicates that there were two gates, namely in gate and out gate and the workman was seen holding the self starter

between these two gates and very close to the in gate. It has also come in evidence that there were about 8 to 10 buses standing near the in gate and therefore, after picking up the self starter, the workman had no choice but to take a circuitous route to reach the in gate along with the self starter, so as to take it inside the depot. The charge of theft was, thus, imaginary and in fact there was no material to hold that by lifting the self starter, the workman had committed an act of theft The charge of theft would not arise unless the workman was caught at the outer gate while taking away the self starter.

7. The Tribunal has taken a reasonable view on analysing the evidence and recorded a finding that the charge of theft was not proved. Once, the charge could not be proved, the order of dismissal based on such charge, would be devoid ab initio and, therefore, required to be set aside. The Tribunal has, therefore, held that the action of dismissal was illegal and unjustifiable. The consequences of reinstatement and continuity in service, with all consequential benefits followed.

8. It is also required to be noted that the challenge to the Award is highly belated and only after respondent No.5 has issued a recovery certificate for execution of the impugned Award, that the petitioner approached this Court. In any case, the challenge to the Award has been examined on merits and without holding the point of delay against the petitioner.

9. Having considered the arguments advanced at the Bar and the reasoning given by the Tribunal in support of its Award, it is clear that the challenge to the Award is devoid of merits and hence, the petition must fail. The same is, hereby, rejected summarily.

B.H. MARLAPALLE, J.

ssm.